

EVIDENTIARY RIGHTS

(Right to Call and Examine Witnesses)



September 2022

About Cambodian Center for Human Rights

The Cambodian Center for Human Rights (“CCHR”) is a non-aligned, independent, non-governmental organization (“NGO”) that works to promote and protect democracy and respect for human rights – in particular civil and political rights – in the Kingdom of Cambodia (“Cambodia”).

CCHR’s vision is of a peaceful Cambodia in which all people can enjoy the fundamental human rights to which they are entitled, all are subject to the rule of law without impunity, all are treated equally without discrimination, all are empowered to participate fully in the democratic process, and all can share in the benefits of Cambodia’s sustainable economic development. CCHR’s logo shows a white bird flying out of a circle of blue sky – this symbolizes Cambodia’s bid for freedom.

CCHR’s Cambodian Human Rights Portal, accessible at <http://www.sithi.org>, is the 2011 winner of the Information Society Innovation Fund Award in the category of Rights and Freedoms and the 2013 winner of the Communication for Social Change Award awarded by the Centre for Communication and Social Change at the University of Queensland in Brisbane, Australia.

For more information about CCHR, please visit www.cchrcambodia.org.

About the Fair Trial Rights Project

The Module on Evidentiary Rights is part of a series of modules on fair trial rights produced by CCHR’s Fair Trial Rights Project (“the FTR Project”). The FTR Project is the first – and only one – of its kind in Cambodia, uniquely and innovatively working to promote and protect fair trial rights in practice. It overall aims to increase the impartiality and independence of Cambodia’s judiciary by supporting the right to a fair trial in Cambodia’s courts. In pursuit of this goal, the FTR project has two specific objectives: to socialize the concept of fair trial rights among the public by raising its awareness of fair trial rights and to increase compliance with fair trial standards within the judiciary through trial monitoring.

Acknowledgments

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Queries and Feedback

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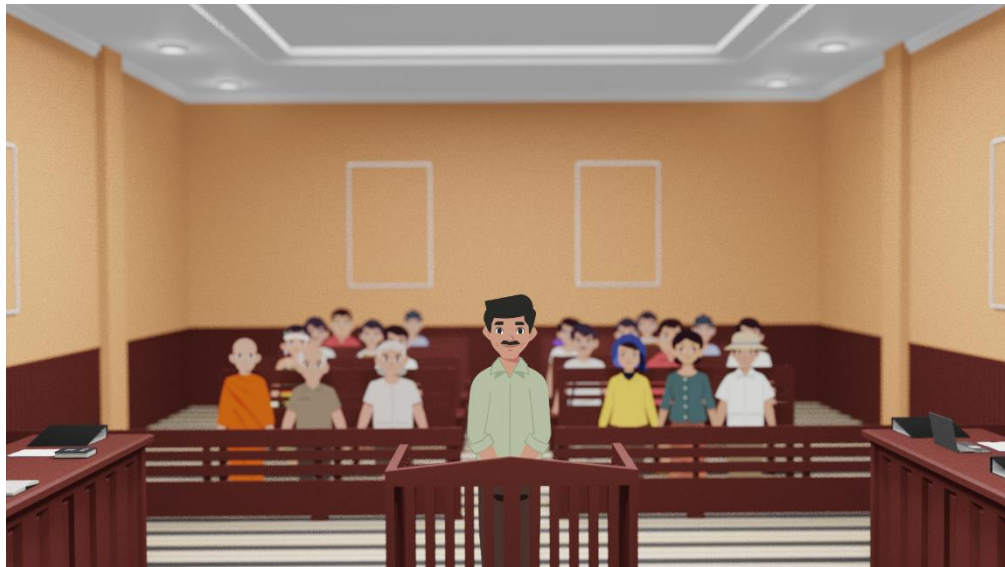
**Evidentiary Rights – The Right
to Call and Examine
Witnesses**

1. Definition

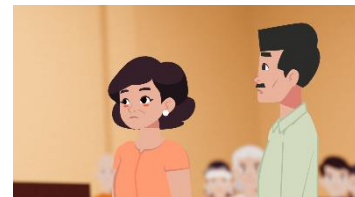


All the decisions made by the court must be based exclusively on evidence presented during the trial. It is therefore essential that each party is given the opportunity to present evidence and call witnesses in support of their case and to cross-examine witnesses called by other parties to challenge evidence that they do not accept.¹

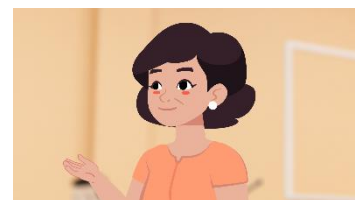
Evidentiary rights, including **the right to call and examine witnesses**, give the defense the same legal powers to present evidence, as well as call, examine and cross-examine witnesses as the prosecution:²



Calling of witnesses: Witnesses can be called by the court on its own or at a party's request. This means that the defendant can compel the attendance of witnesses and present its own witnesses and experts to testify in their favor.



Examination of witnesses: Witnesses can be examined by the court regardless of who calls the witness. Each party, including the defendant, can question their own witnesses to support their case.



Cross-examination of witnesses: Each party is entitled to cross-examine witnesses presented by the other parties. This means that the defendant can question the prosecution witnesses in order to challenge the testimonies made against them. All the evidence presented at the trial may be challenged.

¹ UN Human Rights Committee ("UNHRC"), General Comment No.32 - Article 14: Right to equality before courts and tribunals and to a fair trial," (CPR/C/GC/32, 23 August 2007), para. 13 and 39, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F32&Lang=en (UNHRC, General Comment No.32).


² UNHRC, General Comment No.32, para. 39.

2. Legal Framework

2.1 International Law

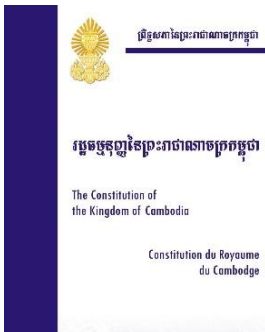
The **International Covenant on Civil and Political Rights (“ICCPR”)** protects this right and gives defendants the ability to call and examine witnesses.





Article 14 (3) (e) of the ICCPR: *“In the determination of any criminal charge against him, everyone shall be entitled to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”*

2.2 Cambodian Law




The right to call and examine witnesses is implicitly protected by Article 38 of the **Constitution of the Kingdom of Cambodia** (“the Constitution”), which states that *“Every citizen shall enjoy the right to defense through judicial recourse.”*

It is also explicitly protected under the **Code of Criminal Procedure of the Kingdom of Cambodia** (“CCPC”), which provides further details about who must be heard in the court and who may call and question witnesses.

Article 153 of the CCPC:

“The investigating judge may question any person whose response is deemed useful to the revelation of the truth [...]. The investigating judge may also arrange a confrontation between the charged person [...] and witnesses.”



Article 154: *“Before the interview, each witness shall swear in accordance with their religion or beliefs that he/she only speaks the truth. The formality of the oath shall be defined in the annex of this Code.”*

Article 298: *“At their expenses, the accused and civil party may summons witnesses who have not been summoned by the Prosecutor.”*

Article 321: *“Unless otherwise required by a law, any evidence in criminal cases is freely admissible. The court shall have a free choice to determine the value of the evidence submitted to the court on the ground of its true belief. The decision of the court shall be based only on the evidence which it has in the file or which has been presented at the hearing. A confession shall be submitted to the court for consideration in the same manner as other evidence. Answers given under the physical or mental duress shall have no evidentiary value. Communications between the accused person and his/her lawyers is not admissible as evidence.”*

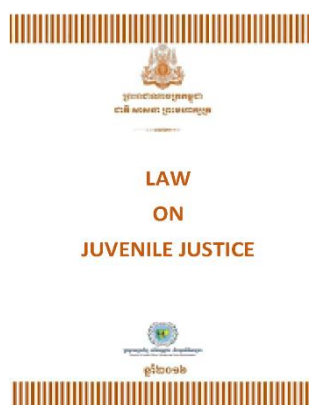
Article 324: *“At the commencement of the trial hearing, each party may request the court to hear witnesses who are present in the court room but who were not properly summoned to testify. Taking the testimony of those witnesses shall be approved by the presiding judge. The court clerk shall record the identity of the witnesses and instruct them to retreat to the waiting room.”*

Article 326: *“[t]he presiding judge shall listen to the statements of civil parties, civil defendants, victims, witnesses and experts in the order which he deems useful [...] The Royal Prosecutor, the lawyers and all the parties may be authorized to ask questions. All questions shall be asked with the authorization of the presiding judge. Except for questions asked by the Royal Prosecutor and the lawyers, all questions shall be asked through the presiding judge. In case of objection to a question, the presiding judge decides whether the question should be asked.”*

Article 328: *“Before answering the questions, each witness shall swear according to their religion or believe that he/she shall only speak the truth.”*

Article 394: *“Following his questioning of the accused, the presiding judge shall hear the civil party and the civil defendants in the order he deems useful. Witnesses and experts will be questioned only if the court so orders.”*

The **Law on Juvenile Justice** also provides children conflict with the law with the right to call and pose questions to witnesses in Article 6.



Article 6 of the Law on Juvenile Justice: “Every minor suspected or accused of having committed an offence shall have the following basic procedural rights: [...]. The right to present evidence. The right to request to call and pose question to witnesses [...].”

3. Importance



The right to call and examine witnesses provides the court with an opportunity to observe evidence and to hear legal arguments regarding their evidentiary value. It therefore assists the court in its **assessment of the presented various arguments** and in making its decision based on relevant evidence.³



This right enables the defense to investigate the credibility of the prosecution’s witnesses or victims and the reliability of their evidence by questioning them and challenging their testimony.⁴ It also permits a defendant to respond fully to all arguments and evidence presented by other parties at the trial.⁵ The right to call and examine witnesses is therefore critical to ensuring the accused an **effective defense**.⁶

Finally, the right to call and examine witnesses is a fundamental component of the principle of **equality of arms**.⁷ Equality of arms requires that all parties are treated in a way that ensures equality at all stages of the trial and that no party is placed at a disadvantage over the others in presenting their case.⁸



Consequently, if the court does not allow the defense to call and examine witnesses and challenge the evidence presented against the accused in the same way as the prosecution, it will place them at a disadvantage during the trial. By doing so, the court will undermine the principle of equality of arms and deny the accused an effective defense. In addition, the court will not be able to hear all the relevant information and evidence it needs to make an accurate

³ CCHR’s FTR Handbook, page 25.

⁴ The Center for Social Development (“CSD”), ‘Annual Report: The Court Watch Project’, (February 2007).

⁵ Ibid.

⁶ UNHRC, General Comment No. 32, para. 39.

⁷ UNHRC, General Comment No. 32, para. 39.

⁸ CCHR’s FTR Handbook, page 25.

assessment of the facts. This will affect the court's verdict and/or sentence and most likely lead to an **unfair decision against the accused**, including their wrongful conviction.

4. Limitations



The right to call and examine witnesses is **not unlimited**, meaning that the accused cannot obtain the attendance of any witnesses, at any time or in any manner.⁹ This right gives the accused a right to call witnesses **whose testimonies are relevant for their defense** and to be **given a proper opportunity to question and challenge witnesses against them**.¹⁰ This means that if a defendant wants a certain witness to be called on their behalf, they have to explain to the court why they consider the testimony of a particular witness important for the case.

However, a violation of the defendant's rights would occur if the court allowed the prosecution to invite an important witness, but refused to invite an equally important and relevant witness the defendant proposed.

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⁹ UNHRC, General Comment No. 32, para. 39; UNHRC, "Peart v Jamaica," Communications No. 464/1991 & 482/1991, UN Doc CCPR/C/54/D464/1991, (24 July 1995), para.11.5, <http://hrlibrary.umn.edu/undocs/html/464-482-1991.html>.

¹⁰ UNHRC, General Comment No.32, para. 39.